UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAND-O-SUN DAIRIES, LLC

and **Case: 5-CA-36199**

BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 358, AFL-CIO

RESPONDENT LAND-O-SUN DAIRIES, LLC'S REPLY TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO THE NOTICE TO SHOW CAUSE

Respondent Land-O-Sun Dairies, LLC ("Land-O-Sun," the "Respondent," or the "Company") respectfully submits the following Reply to Counsel for the Acting General Counsel's Response to the Notice to Show Cause, which was filed by Counsel for the Acting General Counsel ("General Counsel") on March 30, 2011. Based on the parties' prior briefing and the additional arguments presented below, Land-O-Sun requests that the Board: (a) deny the General Counsel's motion for summary judgment; and (b) grant Land-O-Sun's motion for summary judgment and dismiss the Complaint in this matter as untimely.

I. The General Counsel's Motion For Summary Judgment Must Be Denied Because The Office Clerical Employees Are Expressly Excluded From The Unit

a. The Undisputed Evidence Demonstrates That The Clerical Employees Are Office Clerical Employees

The General Counsel's motion for summary judgment must be denied because the undisputed factual evidence demonstrates that the clerical employees are office clerical employees who are expressly excluded from the bargaining unit. The General Counsel asserts that there is no issue of fact as to the nature of the clerical employees, and that they must be considered plant clerical employees regardless of the undisputed evidence to the contrary. The

nature of the clerical employee is the very heart of the allegations in the Complaint, Land-O-Sun adamantly disputes that the clerical employees are included in the bargaining unit since office clerical employees are excluded from the unit, and the nature of the clerical employees has never been considered or decided. The General Counsel summarily asserts that the clerical employees at issue are plant clerical employees, but Land-O-Sun has submitted undisputed factual testimony that the clerical employees are office clerical employees. The nature of the clerical employees is a material fact because if the clerical employees are office clericals, then the employees are not included in the bargaining unit and Land-O-Sun has not committed any unfair labor practice. Indeed, there is no more material fact in this case.

The General Counsel asks that the Board ignore the facts of the case by relying on a administrative procedural technicality. Instead of examining the facts to determine whether the employees are actually plant or office clerical employees, the General Counsel argues that the facts should be disregarded and the employees must be presumed to be included in the unit – regardless of the undisputed evidence or 70 years of Board precedent holding that office and plant clerical employees do not share a community of interest.

The General Counsel has not pointed to a single fact that would suggest these employees are plant clerical employees. Rather, the General Counsel has argued that the decisions of the Regional Director of Region 5 and the Board in connection with Land-O-Sun's UC Petition (5-UC-405) provide factual support for finding the clerical employees to be plant clerical employees. This argument is entirely without merit. The General Counsel badly misrepresents the Regional Director's and the Board's decisions. Neither the Regional Director nor Board investigated the *facts* underlying Land-O-Sun's UC petition. Neither the Regional Director nor the Board reviewed any testimony or documents relevant to the *nature* of the clerical employees.

Neither the Regional Director nor the Board held a hearing to accept or consider testimony or other evidence related to the clerical employees' job duties. And neither the Regional Director nor the Board issued a decision on the merits of Land-O-Sun's Petition based on the nature of the clerical employees. Rather, the Regional Director dismissed Land-O-Sun's UC petition on procedural grounds without investigating or holding a hearing on the merits. The Board affirmed the dismissal of the UC Petition on procedural grounds without further investigation or holding a hearing. Whether an employee is a plant or office clerical employee is a highly-fact intensive question and each case depends on its unique facts. No facts relevant to nature of the clerical employees were examined or determined by the Regional Director or the Board in dismissing Land-O-Sun's UC Petition on procedural grounds. Therefore, the General Counsel's argument that the Regional Director's and Board's decisions amount to factual support for the conclusion that the clerical employees are plant clericals is entirely without merit. Instead, the General Counsel's argument amounts to a claim that the Board should close its eyes to the facts of this case and rest an unfair labor practice finding entirely on a faulty procedural presumption.

Refusing to consider the facts of this case for procedural reasons would be a denial of due process. *Garlock Equipment Co. v. NLRB*, 709 F.2d 722, 723 (CADC 1983) (finding that "[i]f the Board holds no hearing in amending a certification, it may not summarily dispose of a ... representation question in subsequent unfair labor practice proceedings where the employer raises substantial factual issues material thereto.").

b. General Counsel's New Argument Regarding Estoppel Must Be Rejected

In its Response to the Notice to Show Cause, the General Counsel advances the argument that the *Excelsior* list should have an estoppel effect on Land-O-Sun. This is essentially the same argument related to the *Excelsior* list made previously, but couched under a new legal theory. Regardless of which legal theory is employed, the Board and Courts have repeatedly

rejected the notion that the *Excelsior* list is binding statement of who is included in the bargaining unit. *Pacific Beach Corp.*, 344 NLRB 1160, 1162 n.10 (2005) (rejecting ALJ's argument that employer cannot assert that employee was a supervisor because it put him on the voter eligibility list); *Dauman Pallet, Inc.*, 314 NLRB 185, 194 fn. 13 (1994) ("The fact that the company puts a person's name on what is called an '*Excelsior* list' neither means that he is an eligible voter or that he should be counted as part of the appropriate unit . . . ."); *Henry Ford Health System v. NLRB*, 105 F.3d 1139, 1142 (6th Cir. 1997) ("Although the [employees] may have been on the *Excelsior* eligibility list and may have voted in the election, the Director reasoned that this falls short of establishing . . . that these two classifications are part of the recognized unit" (omission in original)); *Kirkhill Rubber Co.*, 306 NLRB 559, 560 n.4 (1992) ("the placement of an employee's name on the *Excelsior* list is not determinative of that employee's status.")

The General Counsel has not cited a single case applying the estoppel theory to an *Excelsior* list. Indeed, one Board decision has even rejected the very argument that an employer is estopped from asserting that an employee is in the bargaining unit by excluding that employee from the *Excelsior* list. In *Cavanaugh Lakeview Farms*, 302 NLRB 921, 921 n.1 (1991) the Board found "no merit in the . . . argument that the Employer is estopped to oppose the challenges by reason of the Employer's having earlier excluded the names of the challenged voters from the eligibility list." (emphasis added).

Moreover, the Board has taken the exact position opposite to the one the General Counsel takes in this case. In *NLRB v. Emro Marketing Co.*, 768 F.2d 151, 157-58 (7th Cir. 1985), the court noted that it "agree[d] with the position of the Board at oral argument that the submission of an *Excelsior* list, which is mandatory and is utilized in every representation election, is of little

help in determining the intended scope of a pre-election stipulation." (emphasis added.) The General Counsel has not explained its reasons for applying a different rule in this case.

Finally, the estoppel theory, even if it were a viable theory in this situation (and it is not), does not apply to the facts of this case. The *Excelsior* list is not, and is not intended to be, a statement by the employer to define the bargaining unit. The list is given to the Union to allow the Union to contact employees for purposes of the campaign leading to the election. *See Dauman Pallet, Inc.*, 314 NLRB 185, 194 fn. 13 (1994) ("The purpose of this rule is to allow the union to contact those people for the upcoming election and the rule does not purport to be binding on any party regarding whether any particular person on the list (or left off the list), will ultimately be considered an eligible voter.") Nor is the *Excelsior* list given to the union with the intent of causing it to rely on that list as the definitive statement of who is in the bargaining unit. Given the abundance of precedent to the contrary, the Union cannot reasonably rely on the *Excelsior* list as a statement of fact regarding the appropriate bargaining unit. The estoppel theory simply cannot be applied to the *Excelsior* list.

Under any theory, estoppel or otherwise, the *Excelsior* list does not have the legally binding nature that the General Counsel attempts to give it. The General Counsel's argument would convert every *Excelsior* list into a "Norris-Thermador" agreement, which is legally distinct and serves an entirely different purpose. *See Norris-Thermador Corp.*, 119 N.L.R.B. 1301 (1958). Therefore, the Board must deny the General Counsel's motion for summary judgment and consider the true nature of the clerical employees, which will show that Land-O-Sun has not committed any unfair labor practice in this case.

II. The General Counsel's Arguments Regarding The Timeliness Of The Complaint Must Be Rejected And Land-O-Sun's Motion For Summary Judgment Should Be Granted

a. No Evidence Of A Condition Subsequent

As in the General Counsel's prior Reply brief, the General Counsel's Response to the Notice to Show Cause continues to assert the unsupportable argument that the parties reached a tacit and unwritten agreement that the CBA would not be applicable to the clerical employees until the occurrence of a "condition subsequent." Land-O-Sun adamantly denies that any such agreement on a condition subsequent to the applicability of the CBA was reached with the Union, and that suggestion draws silence and a confused look from those who were actually at the bargaining table. The General Counsel has presented virtually no evidence of a meeting of the minds between the Land-O-Sun and the Union on a condition subsequent. The General Counsel's argument rests almost entirely on a single opinion by a Union representative that the nature of the clerical employees was "between the Company and the labor Board." The General Counsel argues that this seven-word unilateral statement was in actuality a complex, sophisticated, and complicated agreement between the parties that the CBA would be applicable to a subset of employees only if and when the Board made a ruling that the employees were plant clericals. The General Counsel's argument defies logic and common sense. There was no such agreement, and such a curt and ambiguous statement by a Union representative hardly offers support or evidence of the complex, bilateral arrangement the General Counsel has suggested.

Incidentally, if the applicability of the CBA to the clerical employees *were* subject to the "condition subsequent" of a Board determination of the nature of the clerical employees, the CBA would still not be applicable to those employees because the Board has yet to consider and decide the merits of whether the employees are plant or office clerical employees. Thus, even if

the General Counsel *were* correct that the parties agreed to a condition subsequent to the applicability of the CBA, Land-O-Sun has not committed an unfair labor practice because that condition subsequent, a ruling as to the nature of the clerical employees, has not occurred.

Moreover, in its Response to the Notice to Show Cause, Land-O-Sun demonstrated that the Union believed the CBA to be applicable to the clerical employees immediately upon ratification because the Union sent a letter to the Company on March 31, 2011 (just three days after the CBA became effective) requesting that the Company begin deducting dues for the "**employees who have joined the Union as of March 28, 2011.**" (*See* Exhibit A hereto, emphasis added.) The Union requested that the dues deduction begin "the first week of April, as per the collective bargaining agreement." (*Id.*) The list of employees in the letter included four of the five clerical employees at issue. (*Id.*) Obviously, the Union would not have requested dues deduction for the clerical employees unless it believed the CBA was applicable to them. In the absence of a valid CBA that covered them, such payments to the Union would have been unlawful. 29 U.S.C. § 186.

Ignoring this evidence, the General Counsel argues that the Union's March 31, 2010 letter supports the existence of a condition subsequent because the letter did not mention anything about Land-O-Sun's repudiation of the CBA with respect to the clerical employees. The Union's letter makes no reference to repudiation because the purpose of the letter was not to address repudiation. The purpose of the letter was to request that Land-O-Sun begin withholding dues from the paychecks of employees to whom the CBA was applicable, and the Union obviously maintained the CBA was applicable to the clerical employees, whether they were "office" or "plant" clericals. In fact, the most notable omission from the letter is not a reference to repudiation, but the lack of any reference to a "condition subsequent" to the applicability of

the CBA to the clerical employees. There is no indication in the letter that dues payments for the clerical employees would be withheld only after a decision from the Board. The clerical employees were not set apart or addressed any differently from the other employees included in the bargaining unit. The Union clearly believed that the CBA was applicable to the clerical employees following ratification on March 28, 2011 and that dues would be withheld under the CBA beginning the first week of April 2010, without any mention of a condition subsequent, a UC petition, or a Board decision.

Thus, the Union viewed the CBA as applicable to the clerical employees in March 2010, and was well-aware of the repudiation of the CBA with respect to the office clerical employees in March 2010, or the beginning of April 2010 at the latest. In either case, more than 6 months elapsed before the Union filed its charge. Therefore, the charge is untimely and the Complaint must be dismissed.

b. The *Westvaco* Decision Is Not Applicable To The Issue Of Timeliness

Setting aside the newly-raised "condition subsequent" argument, the General Counsel has rested its argument that the charge is timely almost entirely on the Board's decision in *Westvaco*, 268 NLRB 1203 (1984) *enf. denied* 795 F.2d 1171 (1986). Simply stated, the *Westvaco* case is not applicable to the issue of timeliness in this case for two simple reasons: (1) it is inconsistent with subsequent Board decisions that address the timeliness issue in detail and squarely reject the continuing violation theory; and (2) it is factually different. (*See* Land-O-Sun's Response to the Notice to Show Cause, Section D, p. 12-13, for additional discussion.)

First, the *Westvaco* decision predates and is inconsistent with the Board's decisions in *A&L Underground*, 302 NLRB 467 (1991) and *St. Barnabas Med. Ctr.*, 343 NLRB 1125 (2004).

In *A&L Underground*, the Board squarely and in detail addressed the issue of timeliness for a complaint alleging contract repudiation (as alleged in this case). 302 NLRB at 468. The Board considered and rejected the "continuing violation" theory and clearly held that the statute of limitations for contract repudiation claims begins to run when the union has actual or constructive notice of the repudiation. *Id.* at 469. Each subsequent refusal is not a new violation of the contract and does not restart the statute of limitations period. *St. Barnabas Med. Ctr.*, 343 NLRB 1125, 1127 (2004). The General Counsel essentially argues for the applicability of the continuing violation theory in this case by asserting that the dismissal of Land-O-Sun's UC petition restarts the statute of limitations for the Union's charge. The Board has plainly rejected this theory. When the contract repudiation occurs, "a dispute is clearly drawn" and subsequent failures to apply the contract are not new or separate violations that restart the statute of limitations. *Id.* In this case, the Union had actual notice (or at least constructive notice) of the repudiation of the CBA with respect to the clerical employees when the contract became effective on March 28, 2011, or at the latest on April 6, 2011, when Land-O-Sun made its position abundantly clear by filing a UC petition.[1] In either case, the Union did not file a charge within 6 months of receiving notice of the contract repudiation and the complaint is untimely.

Second, the *Westvaco* decision is factually distinguishable. In *Westvaco*, the Regional Director and Board issued decisions on the merits of the union's UC petition following an investigation and a hearing to receive evidence. No such hearing was held herein, and there has

[1] The UC petition did not create any ambiguity in Land-O-Sun's position and it did not require the Union to anticipate that the Company would not follow the Board's order. All the Union was required to do was file a charge within 6 months of receiving notice of the contract repudiation. This is consistent with the policies of Section 10(b)'s time limitations. As noted in *A&L Underground*, "the continuing violation theory impairs the adjudication process because it permits litigation of distant events." 302 NLRB at 468.

been no decision on the merits in this case. Instead, the Regional Director and Board both dismissed Land-O-Sun's UC petition on procedural grounds, without holding a hearing, without considering the evidence, and without issuing a decision on the merits of the issue. This factual distinction makes a substantive difference because in this case the Board's order simply dismissed the UC petition and did not rule on the nature of the clerical employees. Therefore, the *Westvaco* decision is factually distinguishable and does not control this case.

c. An Issue Of Fact As To Timeliness Requires Denial of the General Counsel's Motion for Summary Judgment

The General Counsel requests that its motion for summary judgment be granted and the clerical employees be deemed plant clerical employees without an examination of their nature. At the same time, the General Counsel argues, in the alternative, that there may be an issue of fact related to the timeliness of the complaint. (*See* General Counsel's Response to the Notice to Show Cause, Section II.D., p.12) If there is an issue of fact regarding the timeliness of the Complaint, that threshold issue must be resolved at a hearing and the General Counsel's motion for summary judgment must therefore be denied. Land-O-Sun contends that the undisputed facts demonstrate that the Union's charge was untimely as a matter of law and that, therefore, Land-O-Sun's motion for summary judgment should be granted.

III. CONCLUSION

The undisputed factual evidence in this case demonstrates that the employees at issue are office clerical employees and that no unfair labor practice has been committed, which requires that the General Counsel's motion for summary judgment be denied. Moreover, for the reasons fully articulated above and in Land-O-Sun's prior briefing on the parties' motions for summary

judgment, the Complaint is untimely and Land-O-Sun's motion for summary judgment must be granted.

Respectfully submitted this 13th day of April, 2011.

LAND-O-SUN DAIRIES, LLC

BY: Stephen M. Darden.

by JBH w/ permission

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and exact copy of the foregoing RESPONDENT LAND-O-SUN DAIRIES, LLC'S REPLY TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S RESPONSE TO THE NOTICE TO SHOW CAUSE has been served upon the following via electronic mail and by placing a copy of same with the United States Postal Service with sufficient postage to carry same to said destination(s).

Mr. Ted C. Constable
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THIS the 13th day of April 2011.

HUNTER, SMITH & DAVIS, LLP

Attorney for Respondent Land-O-Sun Dairies, LLC

EXHIBIT A

Affiliated with the Bakery, Confectionery, and Tobacco Workers International Union

Bakery, Confectionery, Tobacco Workers and Grain Millers International Union Local 358

AFL-CIO, CLC, IUF

1311 E. Nine Mile Rd. Highland Springs, Virginia 23075 Phone: (804) 328-2567 Fax: (804) 328-2569

March 31, 2010

Mr. Lloyd Lumpp
Land-O-Sun Dairy
1505 Robin Hood Rd.
Richmond, Va. 23220

Dear Mr. Lumpp:

This letter is to establish the initial group of Pet Dairy employees who have joined the Union as of March 28, 2010.

Each member has provided a Dues Authorization Card as detailed by the collective bargaining agreement. Please begin their dues deduction in the first week of April, as per the collective bargaining agreement. Each members' dues shall be $24.00 per month with no initiation fees for this group.

The names are as follows:

Name	S.S. #
Ackies Jr., Wilbert H.	[redacted]
Barnwell, Ernest C.	[redacted]
Baylor, Steve A.	[redacted]
Beasley, Louis A.	[redacted]
Black, Vernon S.	[redacted]
Bolden, Johnny J.	[redacted]
Boyd, John --	[redacted]
Braswell, Beulah D.	[redacted]
Brown Jr., Wilton A.	[redacted]
Burris, Andrew D.	[redacted]
Carter, Jonathan D.	[redacted]
Charity, Pernell D.	[redacted]
Clark Jr., Willard	[redacted]
Clarke, Garinell O.	[redacted]
Coe, Timothy R.	[redacted]
Coleman, Samuel	[redacted]
Dowtin, Donita A.	[redacted]
Epps, Gwendolyn D.	[redacted]
Epps, Rodney	[redacted]
Fleming Jr., Franklin D.	[redacted]
Foster Sr., Tyrone J.	[redacted]
Ghee, Stephanie L.	[redacted]
Griffin, Cherita E.	[redacted]
Harris, Andre L.	[redacted]

Harris, Roger J.	[redacted]
Holmes, Albert L.	[redacted]
Holmes Jr., Ernest L.	[redacted]
Holmes, Larry D.	[redacted]
Howard, Vincent G.	[redacted]
Jackson, Calvin R.	[redacted]
Jefferson, Eric L.	[redacted]
Johnson, Tammie L.	[redacted]
Jones Jr., Forrest M.	[redacted]
Jones, Patrick L.	[redacted]
Jones, Ronald F.	[redacted]
Marshall, Michael W.	[redacted]
Matthews, Willie W.	[redacted]
Mayo, Natasha Y.	[redacted]
McClenney, Joey L.	[redacted]
Miles, Victor T.	[redacted]
Morgan, Vincent N.	[redacted]
Moseley Jr., Wesley	[redacted]
Moses, Roderick A.	[redacted]
Moses, Wayne D.	[redacted]
Miller, Bruce W.	[redacted]
Proffitt, Charles L.	[redacted]
Ridges, Warren T.	[redacted]
Rivers, Henry D.	[redacted]
Simmons, William	[redacted]
Smith, Alfredo	[redacted]
Staton, Michelle	[redacted]
Stevenson Jr., Rudolph T.	[redacted]
Taylor, Vickie L.	[redacted]
Thompson, Monique L.	[redacted]
Turner, Anthony L.	[redacted]
Tyler, Daniell D.	[redacted]
Tyler Jr., Spencer L.	[redacted]
Walker, Shawn M.	[redacted]
Watson, Erwin M.	[redacted]
Williams, Ellis L.	[redacted]
Woodson, Ralph, C.	[redacted]

If you have any questions please don't hesitate in contacting me by phone at (804) 328-2567 or in writing at the address above.

Thank You
Sincerely yours,

Ted C. Constable
BCTGM Local 358